Supreme Court, U.S.
FILED
JUL 21 1998
OFFICE OF THE CLERK

No. 98 166

In The
# Supreme Court of the United States

October Term 1997

COLLEEN MICHAELS,
*Petitioner,*
v.
WASHINGTON COUNTY CHILDREN SERVICES BOARD,
*Respondent.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON COUNTY OHIO COURT OF APPEALS, FOURTH APPELLATE DISTRICT**

## Petition for Writ of Certiorari

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62 pp

## QUESTION PRESENTED

1. Does the Fourteenth Amendment place a limit on a state's authority to interfere with a parent's right to legal and physical custody of her minor child, when the purported basis for the State's interference is corporal discipline which is not excessive under State law.

## LIST OF PARTIES

The appellant below and petitioner before this Court is Colleen Michaels, mother of John Jandrew. The appellee below and respondent before this Court is the State of Ohio for Washington County Children Services Board.

## TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i

LIST OF PARTIES ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... iv

OPINIONS BELOW ..... 1

JURISDICTIONAL STATEMENT ..... 1

CONSTITUTIONAL AND
STATUTORY PROVISIONS ..... 1

STATEMENT OF THE CASE ..... 2

REASON FOR GRANTING THE WRIT ..... 4

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE COURTS BELOW MISINTERPRETED THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE AND APPLIED THEIR OWN PERSONAL VALUES TO DEPRIVE MS. MICHAELS OF LEGAL CUSTODY OF HER MINOR CHILD FOR LAWFULLY DISCIPLINING HER CHILD ..... 4

CONCLUSION ..... 10

APPENDIX ..... App. i

## TABLE OF AUTHORITIES


CASE — Page No.

*Boddie v. Connecticut*,
401 U.S. 371 (1971) ..... 4

*Ginsburg vs. New York*,
390 U.S. 629 (1968) ..... 5

*In Re John Jandrew*,
692 N.E.2d 621 (Ohio 1998) ..... 1,3

*In Re John Jandrew*,
No. 97 CA 04, 1997 WL 802848
(Wash. Ct. App., Dec. 29, 1997) ..... 1,3,8

*In Re Schuerman*,
599 N.E.2d 728 (Ohio 1991) ..... 6

*Kovacs vs. Cooper*,
336 U.S. 77 (1949) ..... 5

*May vs. Anderson*,
345 U.S. 528 ..... 5

*Meyer vs. State of Nebraska*,
262 U.S. 390 (1923) ..... 4,5

*Moore vs. City of East Cleveland*,
431 U.S. 494 (1977) ..... 4,5,6

*Pierce vs. Society of the Sisters of the Holy Nazareth of Jesus and Mary*,
268 U.S. 510 (1925) ..... 5

*Quinn vs. Nolan*,
7 Dec. Rep. 585 (Ohio 1879) .....6

*Roe vs. Wade*,
410 U.S. 113 (1973) .....5

*Rowe vs. Franklin*,
663 N.E.2d 955 (Ohio 1995).....10

*Skinner vs. State of Oklahoma, ex rel Williamson*,
316 U.S. 535 (1942) .....4,5

*Stanley vs. Illinois*,
405 U.S. 645 (1972) .....4,6

*State vs. Albert*,
456 N.E.2d 594 (Ohio 1983).....6

*State vs. Hoover*,
450 N.E.2d at 715 (Ohio 1982).....6,9

*State vs. Ivey*,
648 N.E.2d 519 (Ohio 1994).....7

*State vs. Suchomski*,
567 N.E.2d 1304 (Ohio 1991).....9

*Wisconsin vs. Yoder*,
406 U.S. 205 (1972) .....5

CONSTITUTIONAL PROVISION

U.S. Constitution Amendment XIV .....1,4,5,10

## STATUTES

Ohio Rev. Code Ann. §2151.031 ..... 7

Ohio Rev. Code Ann. §2151.031(C) ..... 7

Ohio Rev. Code Ann. §2151.04 ..... 7

Ohio Rev. Code Ann. §2919.22 ..... 7

Ohio Rev. Code Ann. §2919.22(B) ..... 6,8,9

Ohio Rev. Code Ann. §2919.22(B)(3) ..... 7

Ohio Rev. Code Ann. §2919.22(B)(4) ..... 7

Petitioner Colleen Michaels prays that a Writ of Certiorari issue to review the judgment entry of the Washington County Ohio Court of Appeals entered in the above-entitled proceeding on December 29, 1997.

## OPINIONS BELOW

The trial court's Opinion is unreported and reprinted in the Appendix (App. 27 through App. 36). The Opinion of the Washington County Court of Appeals, Fourth Appellate District, is unreported and reprinted in the Appendix (App. 2 through App. 26). Petitioner had a discretionary appeal to the Ohio Supreme Court and the Court declined to accept jurisdiction. *In Re John Jandrew*, 692 N.E.2d 621 (Ohio 1998). The Ohio Supreme Court's Judgment Entry is reprinted in the Appendix. (App. 1).

## JURISDICTIONAL STATEMENT

The trial court's Decision regarding custody of John Jandrew was affirmed by the Washington County Court of Appeals. *In Re John Jandrew*, No. 97 CA 04, 1997 WL 802848 (Wash. Ct. App., Dec. 29, 1997). Petitioner Colleen Michaels (mother of John Jandrew), had a discretionary appeal to the Ohio Supreme Court. On April 22, 1998, the Ohio Supreme Court refused to exercise its jurisdiction to hear her appeal. *In Re John Jandrew*, 692 N.E.2d 621 (Ohio 1998).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Fourteenth Amendment to the United States Constitution, which provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

The Ohio statutes that are implicated are reprinted in the Appendix.

## STATEMENT OF THE CASE

On September 3, 1996, a caseworker from the Washington County Children Services Board responded to a report of possible child abuse, involving John Jandrew. TR 53. The caseworker went to John's elementary school, where he spoke to John, and observed some markings on his leg and stomach. TR 54. John told the worker that his mother had "whipped him". The worker went to John's home, where John's mother, Petitioner Colleen Michaels, confirmed that John had been physically disciplined for failing for a period of three days to do his chores. TR 60. The worker did not seek medical attention for John TR 64, and did not remove him from his home. TR 67-68.

A second caseworker then interviewed Petitioner TR 71, and discussed John's behavior problems. Petitioner told the worker that John had been receiving treatment for Attention Deficit Disorder TR 71, and that he had serious behavioral problems. Petitioner was told not to spank John. TR 110. Subsequent to this restriction, John's behavior deteriorated. TR 126-127, 143. Deputy Stackpole removed John from the home on November 24th, and filed an unruly complaint against John. TR 108. John was placed in a foster home, and has remained in foster care since that time.

At the adjudicatory hearing on December 9, 1996, and December 18, 1996, the trial court found John not to be an abused child. TR 186. The trial court found that it "would be pure speculation on the part of the Court to conclude based on the evidence adduced that the corporal

punishment administered to the child created a substantial risk of serious physical harm to the child". TR 186-187. The trial court found that John suffered from Attention Deficit Disorder TR 187, but that no testimony had been presented to indicate that a child with this disorder should not be subjected to corporal punishment. TR 189. However, the trial court went on to find that John was dependent, because Petitioner took no precautions to avoid accidental injury, while punishing John. TR 187.

Although Petitioner agreed at the dispositional hearing to take such precautions, she did not accept continued supervision by Children Services. Petitioner did cooperate but did not agree with their prohibition against spanking. TR 100. Petitioner testified that John's behavior deteriorated, after Children Services' involvement TR 126-127, and John's school bus driver also testified to that effect. TR 143. The trial court awarded temporary to the Washington County Children Services Board. TR 219.

Petitioner timely appealed to the Washington County Ohio Court of Appeals, Fourth Appellate District. The Court of Appeals affirmed the trial court's Decision concerning custody of John. *In Re Jandrew*, No. 97 CA 04, 1997 WL 802848 (Wash. Ct. Ap., Dec. 29, 1997).

Petitioner appealed to the Ohio Supreme Court and the court declined to exercise its discretionary jurisdiction to hear the appeal. *In Re Jandrew*, 692 N.E.2d 621 (1998).

## PRESERVATION OF THE FEDERAL QUESTION

The error implicated by the Question Presented was raised to the Supreme Court of Ohio in the only Proposition of Law raised before that court. The Petitioner in that court alleged a denial of her rights because the Ohio Courts had removed her right to custody of her minor child because she had engaged in corporal punishment even though neither the trial court nor the Court of Appeals had determined the

punishment excessive. The Fourteenth Amendment to the United States Constitution precludes the State from modifying the legal custody of a child when the basis for such modification is the lawful conduct of the parent. The issue was raised before the Washington County Court of Appeals in the First Assignment of Error.

## REASON FOR GRANTING THE WRIT

### I.

The Court should grant certiorari because the Courts below misinterpreted the Fourteenth Amendment Due Process Clause and applied their own personal values to deprive Ms. Michaels of legal custody of her minor child for lawfully disciplining her child.

The Fourteenth Amendment provides in part: "No State shall... deprive any person of life, liberty or property, without due process of law...". This Court has constantly adopted an expansive interpretation of the Due Process Clause. The term "liberty" denotes not merely freedom from bodily restraint. *Meyer vs. State of Nebraska*, 262 U.S. 390, 399 (1923). This Court has long recognized that the term "liberty" includes the freedom of choice. *Moore vs. City of East Cleveland*, 431 U.S. 494, 500 (1977).

This Court has extended this freedom of choice which is protected by the Fourteenth Amendment extends to a large number of areas. It extends to the right of procreation, *Skinner vs. State of Oklahoma*; *Ex Rel Williamson*, 316 U.S. 535, 541 (1942); marriage, *Boddie vs. Connecticut*, 401 U.S. 371, 376 (1971), and choice of living companions, *Moore vs. East Cleveland*, 431 U.S. at 499.

Within this right of personal choice in family matters is the right of a parent to the custody of her natural child. *Stanley vs. Illinois*, 405 U.S. 645, 651 (1972). The private

interest of a parent in her child warrants deference which comes to this Court with a momentum for respect lacking when an appeal is made involving liberties which derive merely from shiftly economic arrangements. *Kovacs vs. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurther concurring). The right to the companionship of one's children has been deemed essential, *Meyer vs. Nebraska*, 262 U.S. at 399, the basic civil right of man; *Skinner vs. Oklahoma*, 316 U.S. at 541; and a right far more precious than property rights; *May vs. Anderson*, 345 U.S. 528, 533 (1953).

The rights associated with custody extend to a mother's decisions concerning the raising of her child. The child is not the mere creature of the State; those who nurture him and direct him have a right and a duty to recognize and prepare the child for additional obligations in adulthood. *Pierce vs. Society of the Sisters of the Holy Nazareth of Jesus and Mary*, 268 U.S. 510, 535 (1925).

The values of parental discretion of the upbringing of their children in the early and formative years have a high place in our society. *Wisconsin vs. Yoder*, 406 U.S. 205, 213-214 (1972); *Ginsburg vs. New York*, 390 U.S. 629, 639 (1968). The Court has consistently protected a parent's decisions concerning child rearing. *Moore vs. City of East Cleveland*, 431 U.S. at 505. The Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. Id at 503.

The Fourteenth Amendment's right to due process also protects a right of personal privacy or a guarantee of certain areas or zones of privacy. *Roe vs. Wade*, 410 U.S. 113, 152 (1973). This Court's decisions have consistently acknowledged "a private realm of family life which the State cannot enter". *Moore vs. City of East Cleveland*, 431 U.S. at 499.

The State can only infringe upon these protected rights under the Due Process Clause by demonstrating a compelling State interest. *Roe vs. Wade*, 410 U.S. at 155.

When the government intrudes on choices concerning the family, this Court must carefully examine the importance of the governmental interests advanced. *Moore vs. City of East Cleveland*, at 499.

All of the above authorities make it clear that at the very least a parent's interest in retaining custody of her child is cognizable and substantial. *Stanley vs. Illinois*, 405 U.S. at 652.

In the present case, the trial court and the Washington County Court of Appeals determined that there was not excessive corporal punishment pursuant to R.C. §2919.22(B). Yet both the trial court and the Court of Appeals used those legal acts of corporal punishment as the sole factual basis to award the Washington County Children Services Board with custody of the child.

The use of corporal punishment in this country as a means of disciplining children dates to the colonial period. The practice of corporal punishment continues to play an important rule in the raising of the children. *State vs. Albert*, 456 N.E.2d 594 (Ohio 1983). One Ohio court has held that:

> "From the time of Solomon to the present, parents have had the right, in a proper manner and to a proper degree, of inflicting corporal punishment on their children, and when the parent sends the child to a public school, the teacher has the same right while the child is under his or her charge."

*Quinn vs. Nolan*, 7 Dec. Rep. 585, 586 (Ohio 1879). This observation still rings true today. *State vs. Hoover*, 450 N.E.2d 710, 715 (Ohio 1982).

The law of the State of Ohio has long recognized that parents have the right of restraint over their children and the duty of correcting and punishing them for misbehavior. *In Re Schuerman*, 599 N.E.2d 728, 730 (Ohio 1991). Parents must be given reasonable latitude to impose discipline as the

best interests of their children dictates. Some children need more discipline than other children. Some respond without ever being so disciplined, a sharp word suffices. It is the parent who in the first instance is the best judge of what works best with each child. *State vs. Ivey*, 648 N.E.2d 519, 526 (Ohio 1994).

The Washington County Children Services Board filed a complaint alleging that John Jandrew was an Unruly Child in violation of R.C. §2151.031 and a Dependent Child in violation of R.C. §2151.04. The gravamen of the complaint was simple, the mother of the child, Colleen Michaels, employed improper corporal discipline.

R.C. §2151.031(C) specifically deals with the issue of corporal punishment:

> Exhibits evidence of any physical or mental injury or death, inflicted other than by accidental means, or an injury or death which is at variance with the history given of it. Except as provided in division (D) of this section, a child exhibiting evidence of corporal punishment or other physical disciplinary measure by a parent, guardian, custodian, person having custody or control, or person in loco parentis of a child is not an abused child under this division if the measure is not prohibited under section 2919.22 of the Revised Code. (Emphasis added).

R.C. §2919.22(B)(3) and (4) provides the following guidelines with respect to corporal punishment:

> (3) Administer corporal punishment or other physical disciplinary measure, or physically restrain the child in a cruel manner or for a prolonged period, which punishment,

discipline, or restraint is excessive under the circumstances and creates a substantial risk of serious physical to the child.

The trial court concluded that in the present case the corporal punishment was lawful based upon the above statutes. TR 218. However, the judge acknowledged that the discipline in the present case offended his own personal senses. TR 186. The court concluded that because Ms. Michaels did not restrain her child when administering corporal punishment, the child might move which would cause the child to suffer a substantial injury and Ordered that custody of the child should be transferred. TR 187-8.

The trial court's concern for John Jandrew was laudable. However, the trial court erred when it imposed its personal views concerning what the law should be, rather than the requirements contained in R.C. §2919.22(B). This is especially apparent when the trial judge observed "The society I believe has come to the position where they have certain standards that they would like to see us move toward". TR 260. However, if we are going to substitute our personal views, should we not encourage a return to the former methods of discipline that seemed to help our prison population under control. Could it be that our failure to discipline is the cause of our bursting prison numbers? The critical issue in the instant case is not our personal views, for if society wants to modify its standard concerns, then the Ohio Legislature should amend R.C. §2919.22(B).

The Washington County Ohio Court of Appeals made the same errors that the trial court made. The Washington County Children Services Board did not appeal the finding that John Jandrew was not abused or inappropriately punished. The Court of Appeals implicitly agreed with the trial court that John was not abused because there did not exist a substantial risk of serious physical harm to the child. *In Re John Jandrew*, No. 97 CA 04, 1997 WL 802848 (Wash. Ct. App., Dec. 29, 1997), slip op. at 10. The

Court of Appeals employed the lawful corporal punishment which did not constitute abuse as a factual basis for upholding the trial court's decision that the child was dependent:

> --John twists and jumps while corporal punishment is being administered;
>
> --John's mother does not use any safeguards to prevent her from accidentally striking the child;
>
> --John has suffered injuries to his stomach and thigh as a result of the corporal punishment.

Id at 12-13.

It is difficult to conceive of any child that at some point will not twist and turn when receiving corporal punishment. The injuries that the child did incur were not excessive as R.C. §2919.22(B) requires. John Jandrew did not require medical attention. John Jandrew was still able to attend school.

Both lower courts emphasized that they were not finding corporal punishment as per se inappropriate punishment. Id at 13. Such a finding, if made, would have been clearly improper. *State vs. Suchomski*, 567 N.E.2d 1304, 1305 (1991); R.C. §2919.22(B).

Instead, the Court of Appeals and trial court choose to create its own standards to determine when excessive force is used to discipline the child. Id at 14. The lower courts, by creating their own standards, ignored the exclusive standards set forth by the legislature. See R.C. §2919.22(B); *State vs. Hoover*, 450 N.E.2d at 715 (Ohio 1982). The Court of Appeals, when it applied its own standards, determined that the nature of the injuries incurred by John caused the child to be dependent. Id at 12-13. These were the same injuries that the trial court and Court of Appeals had

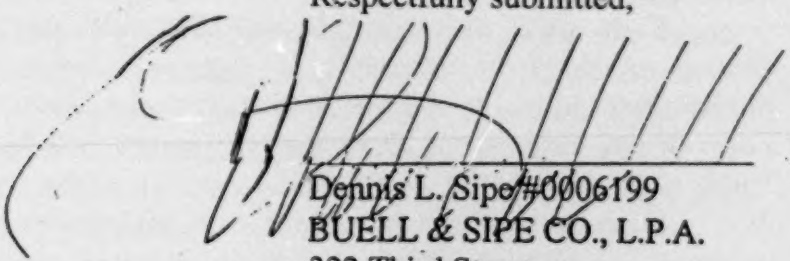
determined were not of such a nature to warrant a finding that John was abused.

## CONCLUSION

The Court below misinterpreted the Fourteenth Amendment and the limitation that it places upon the State's right to interfere with a parent's right to raise her own child. The courts applied their own personal values concerning discipline. The concern for a child's wellbeing or best interests did not provide the courts with the license to judge the rights and lifestyles of Petitioner pursuant to non-statutory codes of moral or social values. *Rowe vs. Franklin*, 663 N.E.2d 955, 956-957 (Ohio 1995).

For these reasons identified herein, Petitioner's right to Due Process under the Fourteenth Amendment was violated. Through the application of its own personal values, the courts below violated Ms. Michaels' substantial constitutional right to the custody of her child, John Jandrew. The Court should grant this petition for certiorari.

Respectfully submitted,



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# TABLE OF CONTENTS
## Appendix to the Petition

Order
Declining Jurisdiction to Hear Case
In The Supreme Court of Ohio
entered April 22, 1998 ..... App. 1

Decision and Judgment Entry
In The Court of Appeals of Ohio
Fourth Appellate District
Washington County
entered December 29, 1997 ..... App. 2

Journal Entry
State of Ohio, Washington County
In The Court of Common Pleas
Juvenile Division
entered January 14, 1997 ..... App. 27

Journal Entry
State of Ohio, Washington County
In The Court of Common Pleas
Juvenile Division
entered January 9, 1997 ..... App. 34

STATUTES

§2151.031 "Abused Child" Defined ..... App. 37

§2151.04 "Dependent Child" Defined ..... App. 38

§2919.22 Endangering Children ..... App. 39

**THE SUPREME COURT OF OHIO**

In the Matter of:

John Jandrew, Alleged Dependent Child.

[Colleen Michaels, Appellant.]

1998 TERM

Case No. 98-304

Filed: April 22, 1998
Entered: April 22, 1998

**ENTRY**

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case.

COSTS:

Docket Fee, $40.00, paid by Buell & Sipe Co., L.P.A.

(Washington County Court of Appeals; No. 97CA4)

/s/_____
Thomas J. Moyer
Chief Justice

**IN THE COURT OF APPEALS OF OHIO**
**FOURTH APPELLATE DISTRICT**
**WASHINGTON COUNTY**

IN THE MATTER OF:

JOHN JANDREW,

ALLEGED DEPENDENT CHILD.

Case No. 97 CA 4

Filed: December 29, 1997
Entered: December 29, 1997

**DECISION AND JUDGMENT ENTRY**

**APPEARANCES:**

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ABELE, J.

This is an appeal from a judgment of the Washington County Common Pleas Court, Juvenile Division, finding John Jandrew to be a dependent child as defined in R.C. 2152.04(C) and awarding temporary custody to the Washington County Children Services Board.

Appellant, Colleen Michaels, the mother of the child, assigns the following errors.

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN FINDING JOHN JANDREW TO BE A DEPENDENT CHILD."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN GRANTING TEMPORARY CUSTODY OF JOHN JANDREW TO THE WASHINGTON COUNTY CHILDREN SERVICES BOARD."

WASHINGTON, 97 CA 4

Our review of the record reveals the following facts. On September 3, 1996, William Marsee, a caseworker with the Washington County Children Services Board ("WCCS"), visited New Matamoras Elementary School in response to a report of alleged child abuse involving John Jandrew. When Marsee arrived at the school, he met with John. John showed Marsee a mark on his stomach and three marks on his left thigh. Marsee testified that the marks appeared to be bruises. John told Marsee that his mother had whipped him with a hickory switch.

Caseworker Marsee decided to investigate the situation further and visited John's home. At the home, Marsee spoke with appellant's live-in boyfriend, Thomas Morris. Morris told Marsee that both he and the appellant administered corporal punishment. Morris stated that he and appellant use either a belt or a paddle to punish John. Marsee told Morris about John's bruises and asked Morris if he had ever observed such bruises on John prior to

September 3. Morris stated that he had noticed such bruises before, especially after John had been punished with the belt.[1]

Caseworker Marsee then spoke with appellant and questioned her about the bruises on John's stomach and thigh. Marsee asked appellant if she was aware of the bruises. Appellant stated that she knew of the bruise on John's stomach. Appellant further admitted that she had disciplined John the prior evening for failing to perform all of his chores. Specifically, she stated that she "thrashed him with a switch." Appellant explained that John's "jumping around" while she was using the switch caused the bruises on John's stomach and legs. Marsee explained to appellant that "in [his] opinion, and hat of the [WCCS], the marks that were left on [John] were inappropriate."

Caseworker Marsee then suggested that appellant place John with a relative, a friend, or with a therapeutic foster home "to give the family a break so they could all settle down." Appellant told Marsee that she did not believe such a situation would be workable or beneficial. As a final suggestion, Marsee attempted to implement a "safety plan." Under a "safety plan," appellant would not be permitted to physically discipline John until WCCS completed its investigation. Appellant refused to agree to the plan. Marsee informed appellant the she would contact Kimberly Ensign, the caseworker who would be taking over the investigation, the following morning.

On September 4, 1996, Ensign went to John's home and met with appellant. Appellant informed Ensign that John had Attention Deficit Disorder and that physical discipline seemed to control his behavior better than non-physical methods.

Caseworker Ensign was concerned that appellant's method of physical discipline was harmful to John, and on September 27, 1996, WCCS filed a complaint in Juvenile

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[1] Marsee also asked Morris if he (Morris) had ever bruised John as a result of using the belt, but Morris decline to answer.

Court. The complaint alleged that John was an abused or dependent child and asked the court to award WCCS protective supervision of the child.

On October 24, 1996, the court held an initial hearing on the complaint and awarded protective supervision to WCCS. The court permitted John to remain in his home pending further hearing on the complaint. The court further set the matter or an adjudicatory hearing to be held on December 9, 1996.

On November 22, 1996, WCCS, believing that John was "in imminent danger of physical harm or death in his home," filed a motion for temporary custody. WCCS alleged that temporarily removing John from his home was "the only safe option." In support of its motion, WCCS referred to appellant's refusal to accept a case plan which would not allow corporal punishment. Specifically, WCCS stated as follows:

> "[Appellant has] refused to participate in the development of a case plan which also provides for no corporal punishment. The child was spanked by Thomas Morris on November 15, 1996. Additionally, the child is being subjected to constant emotional and psychological abuse. He was told by Morris that he (John) was going to disappear one of these days. Morris also told the boy that the next time a worker from the Children's Services Board came to the home, the child would be taken by the Agency. Morris told a worker to take the child in the child's presence. Morris told a worker that, if the child was disrespectful to the mother, there would be a handprint on his face. Morris insists that he will continue to use corporal punishment, using such language as, 'I would knock him clear out into the yard.' Recently, I

> was reported to the Court that the mother had indicated that there were two choices in this case: either the Children Services Boad would get our of her life or the could take the child."[2]

On November 23, 1996, Washington County Sheriff's Deputy Randy Stackpole responded to an unruly child complaint at appellant's home. Deputy Stackpole testified that John was unable to sit still and that appellant told him she could not control John. Deputy Stackpole told John to sit down, but John would not listen to him either. Deputy Stackpole decided to call WCCS and inform the agency of the situation. The caseworker on call spoke with appellant. After speaking with appellant, the caseworker and the deputy decided that it would be best to remove John from the home.

On November 26, 1996, the court held a shelter care hearing and awarded temporary custody to WCCS pending further hearing on the complaint.

On December 9, 1996 and continuing on December 18, 1996, the court held an adjudicatory hearing. The court found that WCCS had not established, by clear and convincing evidence, that John was an abused child. Rather, the court found that WCCS had established, by clear and convincing evidence, that John is a dependent child. On January 14, 1997, the court journalized its findings. Specifically, the curt found as follows:

> "The child herein has been diagnosed as suffering from 'attention deficit disorder' (ADD). He has been examined and treated by psychiatrists for the past four years. He takes medication for his condition. This medication has not been completely effective in controlling his behavior.

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[2] The testimony presented at the adjudicatory hearing supported WCCS's allegations.

In addition to using passive consequences for misbehavior and rewards for good behavior, the child's mother and Thomas Morris, the man with whom she and the child live, utilize corporal punishment as a last resort in an effort to control the child's misbehavior.

Corporal punishment has, in the past, been effective in controlling the child's behavior.

The corporal punishment is normally administered by striking the child on his buttocks with the palm of the hand, a belt or a paddle which is about one-half inch thick by three to four inches wide.

In early September of this year the mother has occasion to discipline the child for failure to do his assignment chores. On this occasion she used a 'hickory switch' because the belt and paddle were not immediately available. As a result of this corporal punishment the child suffered a welt across his abdomen and numerous welts and a small laceration on his upper left thigh. The child did not require hospitalization or medical attention as a result of these injuries.

The mother of the child has a firm position that she is unable to control the child by means of medication or passive discipline an[d] that the use of corporal punishment is necessary.

It is her stated position that she always attempts to apply corporal punishment to the buttocks of the child and that any bruising or injury to other areas of the child's body is the child's fault because he moves, twists and jumps about while she is applying the

> punishment. It is also her stated position that i[f] she were to accidentally strike the child in or about the head causing injury [sic] while administering corporal punishment, such injury would not be her fault but the result of the child's own doing. She views this injury as though it were a self inflicted injury by the child."

The court found that based upon the above stated facts, "there is a real possibility that the child could be struck in the face, in the head, in the groin or even the testicles by the belt, the hickory switch or the paddle; and that as a result the child could suffer serious disfigurement, substantial incapacity or intractable pain." The court recognized that appellant certainly has the right to administer corporal punishment, but noted that appellant must learn to administer corporal punishment in a safe manner. The court stated that she has yet "to actively address this concern and to take steps toward developing the necessary safeguards needed to protect her son from accidental serious injury while administering corporal punishment." The court, therefore, found, "that the condition and environment of the child are such [as] to warrant the state intervening in order to protect the child from serious physical harm."

On December 23, 1996, the court held the dispositional hearing, and on January 9, 1997, issued a judgment entry stating its decision of disposition. The court found that John's best interests would be served by placing him in the temporary custody of WCCS. Apparently, appellant's complete refusal to cooperate with WCCS in adopting a safe discipline plan greatly influenced the court's decision of disposition.

Appellant timely filed a notice of appeal from the court's January 14, 1997 judgment and the court's January 9, 1997 judgment.

I

In her first assignment of error, appellant alleges that the trial court erred by finding her son to be a dependent child. Specifically, appellant contends that the trial court's decision that John is a dependent child is unsupported by clear and convincing evidence as required under R.C. 2151.35(A). Rather, appellant argues, the trial court's conclusion that John might accidentally suffer injuries while being punished was "pure speculation."

Appellee, on the other hand, asserts that appellant's statement that she would continue to administer corporal punishment and her indication that any injuries John suffered were his own fault presented the court with sufficient evidence to support its finding of dependency.

While we recognize that a parent has a "fundamental liberty interest" in the care, custody, and management of his or her child and an "essential" and "basic civil right" to raise his or her children, In re Murray (1990), 52 Ohio St. 3d 155, 156, 556 N.E.2d 1169, 1171, we note that the rights and interests of the parent are not absolute.

Pursuant to R.C. 2151.27(C), a children services agency may, inter alia, file a complaint requesting temporary or permanent custody of a child alleged to be abused, neglected, or dependent. At an adjudicatory hearing, the court must determine, by clear and convincing evidence, whether the child is abused, neglected, or dependent. R.C. 2151.35(A). If the Court determined that the child is abused, neglected, or dependent, the court must make an appropriate order of disposition.

In the case sub judice, the complaint alleged that John was an abused and/or dependent child. The trial court declined to find that appellant's method of physically disciplining her child rose to the level of abuse as defined in

R.C. 2151.031.[3] Specifically, the court stated that it "would be pure speculation * * * to conclude based on the evidence

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[3] In declining to find abuse, the court stated as follows:

"R.C. 2151.03[1] provides in pertinent part that abused child includes any child who exhibits evidence of any physical or mental injury or death inflicted by other than accidental means or an injury or death which is at variance with the history given of it.

Except as provided in division (D) of this section, a child exhibiting evidence of corporal punishment or other physical disciplinary measure by a parent, guardian, custodian, *** is not an abused child under this division if the measure is not prohibited under Section 2919.22 of the Revised Code. This particular section also states that an abused child includes any child who, because of the acts of his parents, guardian or custodian suffers physical or mental injury that harms or threatens to harm the child's health or welfare.

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R.C. 2919.22(B) provides in pertinent part, no person shall do any of the following to a child ***. One, abuse the child. Two, torture or cruelly abuse the child. Three, administer corporal punishment or other physical disciplinary measure or physically restrain the child in a cruel manner or for a prolonged period which punishment, discipline or restraint is excessive under the circumstances and creates a substantial risk of serious physical harm to the child. Four, repeatedly administer unwarranted disciplinary measures to the child when there is a substantial risk that such conduct if continued, will seriously impair or retard the child's mental health or development.

Serious physical harm to persons is defined under R.C. 2901.01(E) as any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment. Two, any physical harm which creates a substantial risk of death. Three, any physical harm which involves some permanent incapacity, whether partial or total, or which involves some temporary substantial incapacity. Four, any physical harm which involves some

adduced that the corporal punishment administered to the child created a substantial risk of serious physical harm to the child." (emphasis added). Rather, the court found that John is dependent based upon a "real possibility" that he

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> permanent disfigurement or which involves some temporary disfigurement. Five, any physical harm which involves acute pain of such duration as to result in substantial suffering or which involves any degree of prolonged or intractable pain.
>
> R.C. 2901.01(H) defines substantial risk as meaning a strong possibility as contrasted with a remote or significant possibility that a certain result may occur or that certain circumstances may exist.
>
> Now, although the evidence shows that the child suffered injuries which would offend him, the evidence nevertheless fails to show that the corporal punishment inflicted upon the child created a substantial risk of serious physical harm to the child."

We note, as did the trial court, that R.C. 2151.031 specifically addresses the issue of corporal punishment. R.C. 2151.031(C) provides that corporal punishment does not constitute abuse unless the punishment falls within the purview of the "endangering children" statute, R.C. 2919.22. Corporal punishment does not rise to the level of child endangering unless the punishment "is excessive under the circumstances and creates a substantial risk of serious physical harm to the child." R.C. 2919.22(B)(3).

A criminal conviction for a violation of the endangering children statute is not, however, a prerequisite for a juvenile court to find that a child is an abused child pursuant to R.C. 2151.031(C). Rather, sufficient evidence must exist to establish that the circumstances specified in R.C. 2919.22 have occurred. See In re Schuerman (1991), 74 Ohio App.3d 528, 532, 599 N.E.2d 728, 731.

Furthermore, in determining whether corporal punishment is excessive, a court must consider all attendant circumstances, including the age of the child, the child's response to noncorporal punishment, and the behavior being punished. See Kurtz and Gianelli, Ohio Juvenile Law (1997), Section 7.11.

With the foregoing principles in mind, we believe that the trial court properly found, based upon the evidence before it, that John was not an abused child.

might be injured while appellant administers corporal punishment.

Appellant does not dispute that she physically disciplines her child. Appellant also does not dispute that her child's "jumping around" while she is administering corporal punishment occasionally injures her child. Rather, appellant asserts that the trial court's finding that John might be injured while appellant physically disciplined him "was pure speculation on a remote risk" and was not, therefore, based upon the clear and convincing evidence needed to support a finding of dependency.

Appellant recognizes that "children can be found to be dependent, based on a potential risk," but asserts that the potential "risk must be much greater than in this case, and in most cases must be grounded on some definite abuse or neglect in the past." Appellant, therefore, asserts that "[i]t is not necessary to protect John." We disagree.

R.C. 2151.04(C) defines a dependent child as a child "[w]hose condition or environment is such as to warrant the state, in the interests of the child, in assuming his guardianship." R.C. 2151.35(A) requires dependency to be established by clear and convincing evidence. In determining whether a child is dependent, the focus is not directly upon the conduct of the parent, but upon the child's condition and environment. See In re Pitts (1987), 38 Ohio App.3d 1, 525 N.E.2d 814. The parent's conduct may become relevant in a dependency determination

> "insofar as that parent's conduct forms a part of the environment of [the] child. As a part of the child's environment such conduct is only significant if it can be demonstrated to have an adverse impact upon the child sufficiently to warrant state intervention."

In re Burrell (1979), 58 Ohio St.2d 37, 39, 388 N.E.2d 738, 739.

The Supreme Court of Ohio has defined "clear and convincing evidence" as

> "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal."

In re Estate of Haynes (1986), 25 Ohio St. 3d 101, 103-04, 495 N.E.2d 23, 26; see also, State v. Schiebel (1990), 55 Ohio St.3d 71, 74, 564 N.E.2d 54, 60. In reviewing whether the trial court's decision was based upon clear and convincing evidence, "a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof." Schiebel, 55 Ohio St.3d at 74, 564 N.E.2d at 60. If the trial court's judgment is "supported by some competent, credible evidence going to all the essential elements of the case" a reviewing court may not reverse that judgment. Id. Furthermore, "an appellate court should not substitute its judgment for that of the trial court when there exists competent and credible evidence supporting the findings of fact and conclusion of law." Id.

In determining whether a child is dependent, the trier of fact is free to believe all, part or none of the testimony of the witnesses who appear before it. See State v. Caldwell (1992), 79 Ohio App.3d 667, 607 N.E.2d 1096. Issues relating to the credibility of witnesses and the weight to be given the evidence are primarily for the trier of fact. See State v. Tyler (1990), 50 Ohio St.3d 24, 553 N.E.2d 576; State v. DeHass (1967), 10 Ohio St.2d 230, 227 N.E.2d 212.

We believe that competent and credible evidence exists in the record to support the trial court's finding of dependency. Specifically, the trial court found that the following facts established that John's condition and environment warranted the state in assuming his guardianship. First, John "twists and jumps about while corporal punishment is being administered." Second, John's mother "does not utilize any safeguards to prevent her from accidentally [sic] striking the child on areas of the body other than the buttocks." Third, John suffered injuries to his stomach and thigh as a result of corporal punishment. Fourth, appellant "takes the position that it is the child's fault if he is struck other than on the buttocks and not her fault." Finally, appellant "stated it would not be her fault if she should accidentally [sic] hit the child in the head while administering corporal punishment but would be the child's own doing."

The trial court found that the above facts, coupled with Dr. Edward Lynam's testimony concerning John's attention deficient disorder and other conduct disorders created a "real possibility" that John could be seriously injured and warranted the state in intervening.

We readily acknowledge that Ohio law has long recognized that a parent has the right to administer reasonable and appropriate corporal punishment.[4] The punishment, however, may not be unreasonable and "exceed

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[4] Similarly, the laws of other jurisdictions generally permit parents to use "reasonable" corporal punishment. Excessive corporal punishment will, however, constitute abuse. See, generally, Cal. Welf. And Inst. Code Sec. 300(a) (providing that physical abuse does not include reasonable and age-appropriate spanking to the buttocks when no evidence of serious physical injury exists); Cal. Penal Code Sec. 11165.4; Fla.Stat.Ann. Sec. 415.503(9)(a)(1); Ill.Comp.Stat. Ann. Ch. 325, Sec. 513; Pa.Stat.Ann. Tit. 18, Sec. 509(1)(kk); Wyo.Stat. Sec. 14-3-202(a)(ii); United States v. Robertson (C.M.A. 1992), 36 M.J. 190, Hildert v. Iowa Dept. of Human Serv. (1996), 550 N.W.2d 157; People v. Whitehurst (199), 9 Cal.App. 4th 1045, 12 Cal.Rptr.2d 33, State v. P.D.P. (1992), 241 Neb. 828, 491 N.W.2d 58.

the bounds of moderation and inflict cruel punishment." In re Schuerman (1991), 74 Ohio App.3d 528, 531, 599 N.E.2d 728, 730; see, also, State v. Liggett (1948), 84 Ohio App. 225, 83 N.E.2d 663. Punishment which exceeds the bounds of moderation may create an environment that warrants the state in intervening.

We believe, as do most courts that have considered the issue, that the acceptable limit of a parent's right to administer corporal punishment cannot be defined with a bright-line rule or a precise definition. The difficulty in defining a bright-line rule stems from the unique set of circumstances present in each individual case. A finding that a certain amount of force is either excessive or unreasonable will vary depending upon the circumstances of the particular case. In determining whether force is excessive or unreasonable, a court may consider the child's age, physical condition, emotional maturity, intelligence level, ability to understand and correct his or her offending behavior, and the gravity of the misbehavior. Courts, charged with the duty of protecting the health and well-being of children, must grapple with the difficult task of determining whether certain disciplinary measures result in an unreasonable or excessive use of force.

In the case at bar, we again note that the trial court did not find that appellant's method of administering corporal punishment rose to the level of abuse. The trial court determined that the bruises appellant inflicted upon John did not create a substantial risk of physical harm as defined in the Ohio Revised Code. Rather, the trial court found that appellant's method of administering corporal punishment and the evidence of previous injury to John warranted a finding of dependency.

We are compelled to emphasize that the trial court did not determine that corporal punishment is either inappropriate or unlawful in all circumstances. We agree with the trial court, however, that the particulars of this case support the court's finding that John is a dependent child as a

result of the method by which appellant and her live-in companion administer corporal punishment.

First, John suffers from ADD. Dr. Lynam, a child psychiatrist who examined John, testified that John suffers from Conduct Disorder of Childhood Onset (CDC) and Attention Deficit Disorder (ADD). Dr. Lynam stated that children suffering from CDC habitually violate the rights of others, having repeated episodes of fighting with other children, taking objects that do not belong to them, and lying frequently. He testified that the three primary characteristics of ADD include inattentiveness, impulsiveness, and hyperactivity. Dr. Lynam stated that one afflicted with ADD has "great difficulty sustaining attention to any given task because the person cannot filter out distraction."

According to Dr. Lynam, at the time of his evaluation of John, John exhibited signs of both CDC and ADD. Dr. Lynam stated that John could not "sit still in his chair during the [evaluation] and had a difficult time attending to the course of the [evaluation]." Dr. Lynam also testified that John, despite his best intentions, has great difficulty following through with his chores and other tasks.

Dr. Lynam prescribed medications for John's conduct disorders that had less than successful results. Apparently, Dr. Lynam discussed with appellant the issue of corporal punishment as a method of controlling John's behavior. He stated that corporal punishment is not an accepted psychotherapy treatment for children afflicted with ADD and that he believed it would be inappropriate for appellant to administer corporal punishment to John. Dr. Lynam advised appellant to consider alternative methods of discipline, such as behavior modification or counseling.

While corporal punishment may be an effective tool in discipline a child who is not afflicted with ADD, a child with ADD has greater difficulty in obeying his or her parents and may be unable to appreciate the deterrent effect of corporal punishment. According to Dr. Lynam, children suffering from ADD have a greater tendency to act without

thinking about the consequences of their actions as opposed to non-ADD afflicted children of the same developmental level. Appellant must give more thought and consideration in deciding whether to administer corporal punishment, in deciding the particular method of punishment to be employed, and in deciding the appropriate amount of punishment.

Second, we find sufficient credible and competent evidence in the record establishing that John has been injured in the past as a result of appellant's method of inflicting corporal punishment. Photographs show three large bruises on John's thigh and one large bruise across his stomach. Appellant asserts that John causes these unintended injuries because he "jumps around" while she is administering the punishment.

During questioning by the attorney for WCCS, appellant revealed the following information about her policy of administering corporal punishment:

> "Q. I think you told people when they asked you, that the reason he got hit on the leg or the stomach was because he was twitching or turning?
>
> * * * *
>
> A. I make him, when I spank him, he's to stand against something like that. Well, when I used it, he'd be going like that and jumping right as I went to--right as I went to whack him, he'd be going like that, he'd jump right before I'd hit him.
>
> Q. And you would hit him anyway?
>
> A. Well, I was already-- I was already in full swing.
>
> Q. At least four times he jumped and twisted --

A. Oh, yes.

Q. --and turned and you hit him still four times?

A. Well, you don't know this guy, the way he jumps around like that.

Q. In your mind though, if you're going to administer a spanking, if he jumps around to avoid the penalty, the punishment, it's all right to go ahead and hit him?

A. Yes.

Q. And if you're using a paddle, a wooden paddle, and if he ducks down, you hit him--it's all right to hit him in the head, is that the same thing?

A. Well, it'd be the same thing as when you arrest somebody, and, uh, they decide to take off on you, well, they're going to get charged extra for--they're going to get extra discipline for taking off and resisting arrest aside from their own punishment.

I mean, I wouldn't mean to hit him in the head, but that's a self-inflicted type thing, is how I feel."

In order to prevent such unintended injuries from reoccurring, appellant and her companion obviously require assistance in learning a proper, non-injurious method of employing corporal punishment.

While we do not doubt that John presents appellant with difficult and unique problems that at times may appear uncontrollable, appellant must strive to inform herself about the unique problems of raising and disciplining a child suffering from ADD.

Third, we, like the trial court, are greatly concerned with appellant's apparent indifference and unwillingness to employ alternative discipline techniques with John and to administer corporal punishment in a manner that will prevent injuries to John. Past events should alert appellant that the manner in which she and her companion have administered corporal punishment has caused John to receive various "unintended" injuries. Physical injuries to various parts of a child's anatomy should not be tolerated or accepted.

We realize that many of the factors leading the court to conclude that John was dependent related to appellant's conduct, and, as noted above, the conduct of the parent generally is not the focus of a dependency proceeding. In the case at bar, however, appellant's conduct is relevant because it tends to demonstrate "an adverse impact upon [John] sufficiently to warrant state intervention." See Burrell, supra.

Thus, we believe that the foregoing evidence presented the court with competent and credible evidence to satisfy the clear and convincing evidence standard of proof necessary for a finding of dependency. The conditions and environment surrounding John's home life exposed him to a sufficient amount of injury to warrant the state in intervening. Although much of the evidence relating to the conditions and environment concerned what had occurred in the past, as we stated in In re Burchfield (1988), 51 Ohio App.3d 148, 156-57, 555 N.E.2d 325, 333:

> "'[T]he child does not first have to be put into a particular environment before a court can determine that [the] environment is unhealthy or unsafe. *** The unfitness of a parent, guardian or custodian can be predicted by past history.'"

(quoting In re Bishop (1987), 36 Ohio App.3d 123, 126, 521 N.E.2d 838, 841) (citations' omitted). Furthermore, courts have recognized that:

> "'*** [A] child should not have to endure the inevitable to its great detriment and harm in order to give the [parent] an opportunity to prove her suitability. To anticipate the future, however, is at most, a difficult basis for a judicial determination. The child's present condition and environment is the subject for decision not the expected or anticipated behavior of unsuitability of unfitness of the [parent]. *** The law does not require the court to experiment with the child's welfare to see if he will suffer great detriment or harm.'"

Bishop, 36 Ohio App.3d at 126, 521 N.E.2d at 841-42 (quoting, In re East (1972), 32 Ohio Misc. 65, 69, 288 N.E.2d 343, 346).

The trial court, therefore, did not err by determining that clear and convincing evidence existed to support a finding of dependency.

Accordingly, we overrule appellant's first assignment of error.

II

In her second assignment of error, appellant asserts that the trial court erred by granting temporary custody to WCCS. Appellant argues that she intends to employ safer measures of administering corporal punishment to eliminate the risk of injuring her son. Specifically, in a proposed reunification plan, appellant submitted that she would discontinue the physical discipline if John began to resist the punishment. Based upon appellant's intention to safely administer physical discipline, appellant contends that John's

best interests would be served by allowing him to remain in her home.

Appellee claims' that appellant's complete refusal to cooperate with WCCS and to learn alternative discipline techniques support the court's award of temporary custody. Appellee also emphasizes appellant's objections to government interference in the raising of her children.

A juvenile court has broad discretion in the disposition of a dependent child case. See R.C. 2151.353(A). Pursuant to R.C. 2151.353(A), the court may make any of the following orders with respect to a dependent child:

> (1) Place the child in protective supervision;
>
> (2) Commit the child to the temporary custody of a public children services agency, a private child placing agency, either parent, a relative residing within or outside the state, or a probation officer for placement in a certified family foster home or in any other home approved by the court;
>
> (3) Award legal custody of the child to either parent or to any other person who, prior to the dispositional hearing, files a motion requesting legal custody of the child;
>
> (4) Commit the child to the permanent custody of a public children services agency or private child placing agency; or
>
> (5) Place the child in long-term family foster care with a public children services agency.

In choosing among the alternatives, however, the best interests of the child is the court's primary consideration. See In re Pryor (1993), 86 Ohio App.3d 327, 620 N.E.2d 973. Furthermore, in making its dispositional order, the

court must consider which situation will best promote the "care, protection, and mental and physical development" of the child. R.C. 2151.01(A). The court should separate the child from his family environment "only when necessary for his welfare." R.C. 2151.01(C); In re Escue (May 11, 1981), Lawrence App. No. 1487, unreported.

In reviewing a juvenile court's decision to award temporary custody, we employ an abuse of discretion standard. See Miller v. Miller, (1988), 37 Ohio St.3d 71, 523 N.E.2d 846; Pryor, supra; In re Collier (Feb. 4, 1992), Athens App. No. 1494, unreported. Thus, absent an abuse of discretion, we will not reverse the trial court's decision. An abuse of discretion connotes an attitude that is unreasonable, arbitrary, or unconscionable. See In re Jane Doe (1991), 57 Ohio St.3d 135, 137, 566 N.E.2d 1181, 1183. When applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court. In re Jane Doe 1; Berk v. Matthews (1990), 53 Ohio St.3d 161, 559 N.E.2d 1301. We note that "the primary, if not only, consideration in the disposition of all children's cases is the best interests and welfare of the child." Pryor, 83 Ohio App.3d at 332, 620 N.E.2d at 976.

With the foregoing principles in mind, we cannot say that the trial court abused its discretion by awarding temporary custody to WCCS. The trial court recognized that John was living under conditions which may cause him serious physical harm. Appellant admitted that her methods of discipline occasionally injured John. Appellant adamantly refuses to cooperate with WCCS and to learn alternative disciplinary techniques. Apparently, appellant also refuses to administer corporal punishment in a manner that will avoid injury to John. Appellant indicated that she would not accept John in her home if WCCS continued their involvement. Appellant left the court with no choice. If the trial court had allowed John to return home to his mother without giving WCCS supervisory authority, the danger that he could suffer serious harm existed.

Although appellant had proposed a reunification plan under which she would administer corporal punishment in a safe manner, she refused to allow WCCS to have any involvement. The trial court found this "most disturbing":

> "The thing that's most disturbing here is the mother's total and absolute stated position that she refuses to cooperate with the Children Services Board. I don't know how we can protect the interests of the child of the parent is so unwilling to cooperate with the social agencies which have been developed pursuant to statute.
>
> I understand that this child wants to go home. I would love to have that child go home at this time. But I certainly would never think of sending that child home unless it were in protected supervision. The mother has rejected this. It is clear to this Court that there is a need for some kind of parent training in this case, whether you like it or not. Most parents don't like the idea that they may not be the best parents in the world, but his mother has totally rejected doing anything which might cause her to deviate from her absolute desire to be authoritative to the extent of using corporal punishment."

Further, as we noted under our discussion of appellant's first assignment of error, the court need not experiment with the child's environment to determine whether the parent will harm the child in the future. WCCS already had demonstrated to the court that John had suffered harm in the past and that appellant maintained a flippant attitude as to whether he would suffer harm in the future.

We believe that the trial court was well within its discretion in determining that John's best interests would be

served by placing him in temporary custody. We readily acknowledge that parents have the right and responsibility of raising their children, but we are quick to note that parents must exercise their right and responsibility in a reasonable and rational manner. A large body of literature has developed indicating that any form of corporal punishment is inappropriate and unreasonable under any circumstances, yet many members of society believe that reasonable corporal punishment should be an accepted measure of correcting a child's behavior. When administered in an appropriate atmosphere free from passion or anger, we do not question that corporal punishment may serve to effectively discipline a child. The goal of the punishment is to impress upon a child the importance of listening, understanding, and correcting his or her behavior to conform to the established rules of conduct. However, no child should be made to suffer severe bruising or injury to various parts of his body as a result of corporal punishment.

Removing a child from his home and his mother is a drastic measure, but in certain circumstances, such as those present in the instant case, the measure is justified. Courts should strive to maintain the sanctity of the home and should not invade that sanctity in a cavalier fashion to consider child-rearing issues, including corporal punishment. Unfortunately, situations may arise in which parents may engage in practices that are injurious to the child's welfare.

We easily understand that government interference with child-rearing can be an extremely intrusive experience for a parent. When a parent is unable to safely discipline a child, however, the intrusion is not only justified but is necessary to protect the child. The safety and best interests of a child must be the court's paramount consideration.

Having found that the trial court did not commit reversible error, we must affirm the judgment. We wish, however, to emphasize once again that neither the trial court's judgment nor this court's opinion should be construed

as expressing judicial intolerance for parents who choose to use corporal punishment.

Accordingly, we overrule appellant's second assignment of error and affirm the judgment of the juvenile court.

JUDGMENT AFFIRMED.

## JUDGMENT ENTRY

It is ordered that the judgment be affirmed and appellee shall recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Court of Common Pleas, Juvenile Division, to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Exceptions.

Stephenson, P.J. & Kline, J. Concur in Judgment & Opinion

For the Court

BY:/s/_____
Peter B. Abele, Judge

## NOTICE TO COUNSEL

Pursuant to Local Rule No. 12, this document constitutes a final judgment entry and the time period for further appeal.

**STATE OF OHIO, WASHINGTON COUNTY**
**IN THE COURT OF COMMON PLEAS**
**JUVENILE DIVISION**

In the Matter of:

JOHN JANDREW

CASE NO. 96 AN 958

JUDGE RAWSON

Filed: January 14, 1997
Entered: January 14, 1997

**JOURNAL ENTRY**

This cause came on for hearing on December 9, 1996, and thereafter was continued for further hearing on December 18, 1996, upon a Complaint alleging that the child was abused and/or dependent. Present were Prosecuting Attorney Michael G. Spahr on behalf of the Washington County Children Services Board, Kim Ensign, Protective Caseworker for the Washington County Children Services Board, Michele H. Willard, guardian-ad-litem and attorney for John Jandrew, Colleen Michaels, the child's natural mother, and Janet F. Fogle, attorney for Colleen Michaels. Also present at the hearing on December 9, 1996, was Thomas Morris, Colleen Michael's paramour.

At the hearing on December 9, 1996, testimony was taken from Dr. Edward Lynam, a psychiatrist hired by Colleen Michaels to treat her son John Jandrew. Dr. Lynam testified as to the mental illness of Attention Deficit Disorder in general and to specific matters involving communications made to Mrs. Michaels concerning her son. Objection was made to that portion of the specific testimony on the basis that it was protected by the doctor-client privilege. The

testimony was accepted as a proffer, and the parties submitted authority to the Court. The Court hereby FINDS that the specific evidence concerning John Jandrew and communications made to the mother was protected by the doctor-client privilege and that the guardian-ad-litem lacked authority to waive the privilege. It is therefore ORDERED that the testimony by Dr. Edward Lynam as it pertains specifically to treatment of John Jandrew and communications made to Colleen Michaels is **not** admitted.

In the case subjudice, John Jandrew, a child eight years of age is alleged to be abused as defined in R.C. 2151.031(C) and or dependent as defined in R.C. 2151.04(C).

The child herein has been diagnosed as suffering from "attention deficit disorder" (ADD). He has been examined and treated by psychiatrists for the past four years. He takes medication for his condition. This medication has not been completely effective in controlling his behavior.

In addition to using passive consequences for misbehavior and rewards for good behavior, the child's mother and Thomas Morris, the man with whom she and the child live, utilize corporal punishment as a last resort in an effort to control the child's misbehavior.

Corporal punishment has, in the past, been effective in controlling the child's behavior.

The corporal punishment is normally administered by striking the child on his buttocks with the palm of the hand, a belt or a paddle which is about one-half inch thick by three or four inches wide.

In early September of this year the mother has occasion to discipline the child for failure to do his assignment chores. ON this occasion she used a "hickory switch" because the belt and paddle were not immediately available. As a result of this corporal punishment the child suffered a welt across his abdomen and numerous welts and a small laceration on his upper left thigh. The child did not

require hospitalization or medical attention as a result of these injuries.

The mother of the child has a firm position that she is unable to control the child by means of medication or passive discipline and that the use of corporal punishment is necessary.

It is her stated position that she always attempts to apply corporal punishment to the buttocks of the child and that any bruising or injury to other areas of the child's body is the child's fault because he moves, twists and jumps about while she is applying the punishment. It is also her stated position that is she were to accidentally strike the child in or about the head causing injury while administering corporal punishment, such injury would not be her fault but the result of the child's own doing. She views this injury as though it were a self inflicted injury by the child.

Applicable Law

R. C. 2151.031 provides in pertinent part that an "abused child" includes any child who;

"(C) Exhibits evidence of any physical or mental injury or death, inflicted other than by accidental means, or an injury or death which is at variance with the history given of it. Except as provided in division (D) of this section, a child exhibiting evidence of corporal punishment or other physical disciplinary measure by a parent, guardian, custodian, person having custody or control, or person in loco parentis of a child is not an abused child under this division if the measure is not prohibited under section 2919.22 of the Revised Code.

"(D) Because of the acts of his parents, guardian, or custodian, suffers physical or mental injury that harms or threatens to harm the child's health or welfare."

R.C. 2151.04© . defines a dependent child as including any child "whose condition or environment is such as to warrant the state, in the interests of the child, in assuming his guardianship."

R.C. 2919.22(B) provides in pertinent part:

"No person shall do any of the following to a child under eighteen years of age or a mentally or physically handicapped child under the age of twenty-one years of age;

"(1) Abuse the child;

"(2) Torture or cruelly abuse the child;

"(3) Administer corporal punishment or other physical disciplinary measure, or physically restrain the child in a cruel manner or for a prolonged period which punishment, discipline or restraint is excessive under the circumstances and creates a substantial risk of serious physical harm to the child;

"(4) Repeatedly administer unwarranted disciplinary measures to the child, when there is a substantial risk that such conduct, if continued, will seriously impair or retard the child's mental health or development."

'Serious physical harm to persons' is defined under R.C. 2901.01(E) as:

"(1) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

"(2) Any physical harm which creates a substantial risk of death'

"(3) Any physical harm which involves some permanent incapacity, whether partial or total, or which involves some temporary, substantial incapacity;

"(4) Any physical harm which involves some permanent disfigurement, or which involves some temporary, serious disfigurement;

"(5) Any physical harm which involves acute pain of such duration as to result in substantial suffering, or which involves any degree of prolonged or intractable pain."

R.C. 2901.01(H) defines 'substantial risk' as meaning "a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist."

Abuse Not Proved

Although the evidence shows that the child suffered injuries which would offend many, the evidence nevertheless fails to show that the corporal punishment inflicted upon the child created a substantial risk of serious physical harm to the child. It would be pure speculation on the part of the court to conclude, based upon the evidence adduced, that the corporal punishment administered to the child created a substantial risk of serious physical harm to the child.

Dependency Proved

With respect to the allegations of dependency, the court specifically finds that the child is eight years of age and suffers from Attention Deficit Disorder; that the child's mother administers corporal punishment to control the child's misbehavior by striking the child with a belt, a half inch thick by three inch wide paddle or a hickory switch; that the child moves, twists and jumps about while corporal

punishment is being administered; that the mother does not utilize any safe guards to prevent her from accidentally striking the child on areas of the body other than the buttocks; that the child sustained injuries to his left thigh and abdomen as a result of receiving corporal punishment in early September of this year; that the mother takes the position that it is the child's fault if he is struck other than on the buttocks and not her fault; that the mother has stated that it would not be her fault if she should accidentally hit the child in the head while administering corporal punishment but would be "the child's own doing"

The court finds that the under the circumstances of this case that there is a real possibility that the child could be struck in the face, in the head, in the groin or even the testicles by the belt, the hickory switch or the paddle; and that as a result the child could suffer serious disfigurement, substantial incapacity or intractable pain.

It is clear that the mother must learn and utilize procedures to minimize the possibility of such injuries occurring. To date she has failed to actively address this concern and to take steps toward developing the necessary safeguards needed to protect her son from accidental serious injury while administering corporal punishment. Accordingly the court finds that the condition and environment of the child are such as to warrant the state intervening in order to protect the child from serious physical harm.

## Conclusion

The court finds that the allegations of the complaint alleging the child to be an abused child have not been proved by clear and convincing evidence.

The court finds that the allegations of the complaint alleging the child to be a dependent child have been proved by clear and convincing evidence.

WHEREFORE, THE COURT ADJUDGES the child, John Jandrew, to be a DEPENDENT child by reason of being a child whose condition or environment is such as to warrant the state, in the interest of the child, in assuming his guardianship as defined under R.C. 2151.04(C).

/s/_____
Michael G. Spahr
Prosecuting Attorney
Attorney for Washington
County Children Services
Board

_____
Janet A. Fogle
Attorney for
Colleen Michaels,
Mother of the child

/s/_____
Michele Willard
Guardian-ad-litem
and attorney for
the child John Jandrew

_____
Hon. Robert G. Rawson, Judge

**STATE OF OHIO, WASHINGTON COUNTY**
**IN THE COURT OF COMMON PLEAS**
**JUVENILE DIVISION**

In the Matter of:

JOHN JANDREW

CASE NO. 96 AN 958

JUDGE RAWSON

Filed: January 9, 1997
Entered: January 9, 1997

**JOURNAL ENTRY**

This cause came on for a dispositional hearing on December 23, 1996, the Court having previously found the child to be a dependent. Present were Prosecuting Attorney Michael G. Spahr on behalf of the Washington County Children Services Board, Kim Ensign, Protective Caseworker for the Washington County Children Services Board, Michele H. Willard, guardian-ad-litem and attorney for John Jandrew, Colleen Michaels, the child's natural mother, and Janet F. Fogle, attorney for Colleen Michaels. Also present at the hearing on December 23, 1996, in the afternoon was Thomas Morris, Colleen Michaels' paramour.

The Court inquired of the parties as to their respective suggestions for disposition. Upon the arguments of the parties and the evidence adduced the Court finds that it is in the best interest of the child to be in temporary custody of the Washington County Children Services Board. The court therefore orders that the child be placed in the temporary custody of the Washington County Children Services Board. Custody shall terminate on September 27, 1997, unless a motion to extend is timely filed. Review

hearing is scheduled for **August 22, 1997, at 2:15 p.m.** The Court approves the case plan as submitted by the Washington County Children Services Board with the exception of the provisions contained on Page 8A which are not approved. It is therefore ordered that the case plan be made part of the courts order with the additional proviso that members of Thomas Morris' shall be permitted visitation. The Court further orders that the therapists named in the plan shall be used until such time as the parent finds a suitable alternate. The Court further orders that the mother cooperate with Washington County Children Services Board and shall provide such releases as are necessary to permit Washington County Children Services Board to monitor the treatment of the child. It is further ordered that the Frontier School District shall be responsible for the costs of education. It is further ordered that Colleen Michaels shall pay support in accordance with the statutory guidelines. The exact amount shall be determined after computation by the Washington County Child Support Enforcement Agency. The Court finds that the Washington County Children Services Board has made reasonable efforts to prevent or eliminate the need for the child's removal from the custody of his mother, but that these efforts have failed to eliminate the need for the child's removal.

/s/_____
Michael G. Spahr
Prosecuting Attorney
Attorney for Washington
County Children Board Services

_____
Janet A. Fogle
Attorney for Colleen Michaels,
Mother of the child

/s/_____
Michele H. Willard
Guardian ad litem and
Attorney for the child
John Jandrew

_____
Hon. Robert G. Rawson, Judge

## 2151.031 "ABUSED CHILD" DEFINED

As used in this chapter, an "abused child" includes any child who:

(A) Is the Victim of "sexual activity" as defined under Chapter 2907, of the Revised Code, where such activity would constitute an offense under that chapter, except that the court need not find that any person has been convicted of the offense in order to find that the child is an abused child;

(B) Is endangered as defined in section 2919.22 of the Revised Code, except that the court need not find that any person has been convicted under that section in order to find that the child is an abused child;

(C) Exhibits evidence of any physical or mental injury or death, inflicted other than by accidental means, or an injury or death which is at variance with the history given of it. Except as provided in division (D) of this section, a child exhibiting evidence of corporal punishment or other physical disciplinary measure by a parent, guardian, custodian, person having custody or control, or person in loco parentis of a child is not an abused child under this division if the measure is not prohibited under section 2919.22 of the Revised Code.

(D) Because of the acts of his parents, guardian, or custodian, suffers physical or mental injury that harms or threatens to harm the child's health or welfare.

(E) Is subjected to out-of-home care child abuse.

## 2151.04 "DEPENDENT CHILD" DEFINED

As used in this chapter, "dependent child" means any child;

(A) Who is homeless or destitute or without adequate parental care, through no fault of the child's parents, guardian, or custodian;

(B) Who lacks adequate parental care by reason of the mental or physical condition of the child's parents, guardian, or custodian;

(C) Whose condition or environment is such as to warrant the state, in the interests of the child, in assuming the child's guardianship;

(D) To whom both of the following apply:

(1) The child is residing in a household in which a parent, guardian, custodian, or other member of the household committed an act that was the basis for an adjudication that a sibling of the child or any other child who resides in the household is an abused, neglected, or dependent child.

(2) Because of the circumstances surrounding the abuse, neglect, or dependency of the sibling or other child and the other conditions in the household of the child , the child is in danger of being abused or neglected by that parent, guardian, custodian, or member of the household.

## 2919.22 ENDANGERING CHILDREN

(A) No Person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support. It is not a violation of a duty of care, protection, or support under this division when the parent, guardian, custodian, or person having custody or control of a child treats the physical or mental illness or defect of the child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body.

(B) No person shall do any of the following to a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age;

(1) Abuse the child;

(2) Torture or cruelly abuse the child;

(3) Administer corporal punishment or other physical disciplinary measure, or physically restrain the child in a cruel manner or for a prolonged, which punishment, discipline, or restraint is excessive under the circumstances and creates a substantial risk of serious physical harm to the child;

(4) Repeatedly administer unwarranted disciplinary measures to the child, when there is a substantial risk that such conduct, if continued, will seriously impair or retard the child's mental health or development;

(5) Entice, coerce, permit, encourage, compel, hire, employ, use, or allow the child to act, model, or in any other way participate in, or be photographed for, the production, presentation, dissemination, or advertisement of any material or performance that the offender knows or reasonably should know is obscene, is sexually oriented matter, or is nudity-oriented matter.

(C) (1) No person shall operate a vehicle, streetcar, or trackless trolley within this state in violation of division (A) of section 4511.19 of the Revised Code when one or more children under eighteen years of age are in the vehicle, streetcar, or trackless trolley. Notwithstanding any other provision of law, a person may be convicted at the same trial or proceeding of a violation of this division and a violation of division (A) of section 4511.19 of the Revised Code that constitutes the basis of the charge of the violation of this division. For purposes of section 4511.191 of the Revised Code and all related provisions of law, a person arrested for a violation of this division shall be considered to be under arrest for operating a vehicle while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse or for operating a vehicle with a prohibited concentration of alcohol in the blood, breath, or urine.

*39542 (2) As used in division (C) (1) of this section, "vehicle," "streetcar," and "trackless trolley" have the same meanings as in section 4511.01 of the Revised Code.

(D)(1) Division (B)(5) of this section does not apply to any material or performance that is produced, presented, or disseminated for a bona fide

medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

(2) Mistake of age is not a defense to a charge under division (B)(5) of this section.

(3) In a prosecution under division (B)(5) of this section, the trier of fact may infer that an actor, model, or participant in the material or performance involved is a juvenile if the material or performance, through its title, text, visual representation, or otherwise, represents or depicts the actor, model, or participant as a juvenile.

(4) As used in this division and division (B)(5) of this section:

(a) "Material," "performance," "obscene," and "sexual activity" have the same meanings as in section 2907.01 of the Revised Code.

(b) "Nudity-oriented matter" means any material or performance that shows a minor in a state of nudity and that, taken as a whole by the average person applying contemporary community standards, appeals to prurient interest.

(c) "Sexually oriented matter" means any material or performance that shows a minor participating or engaging in sexual activity, masturbation, or bestiality.

(E)(1) Whoever violates this section is guilty of endangering children.

(2) If the offender violates division (A) or (B)(1) of this section, endangering children is one of the following:

(a) Except as otherwise provided in division (E)(2)(b) or (c) of this section, a misdemeanor of the first degree:

(b) if the offender previously has been convicted of an offense under this section or of any offense involving neglect, abandonment, contributing to the delinquency of, or physical abuse of a child, except as otherwise provided in division (E)(2)(c) of this section, a felony of the fourth degree;

(c) If the violation results in serious physical harm to the child involved, a felony of the third degree.

(3) If the offender violates division (B)(2), (3), or

(4) of this section, except as otherwise provided in this division, endangering children is a felony of the third degree. If the violation results in serious physical harm to the child involved, or if the offender previously has been convicted of an offense under this section or of any offense involving neglect, abandonment, contributing to the delinquency of, or physical abuse of a child, endangering children is a felony of the second degree.

*39543 (4) If the offender violates division (B)(5) of this section, endangering children is a felony of the second degree.

(5) If the offender violates division (C) of this section, the offender shall be punished as follows:

(a) Except as otherwise provided in division (E)(5)(b) or (c) of this section, endangering children in violation of division (C) of this section is a misdemeanor of the first degree.

(b) If the violation results in serious physical harm to the child involved or the offender previously had been convicted of an offense under this section or any offense involving neglect, abandonment, contributing to the delinquency of, or physical abuse of a child, except as otherwise provided in division (E)(5)(c) of this section, endangering children in violation of division (C) of this section is a felony of the fifth degree.

(c) If the violation results in serious physical harm to the child involved and if the offender previously has been convicted of a violation of division (C) of this section, section 2903.06, 2903.07, or 2903.08 of the Revised Code, or section 2903.04 of the Revised Code in a case in which the offender was subject to the sanctions described in division (D) of that section, endangering children in violation of division (C) of this section is a felony of the fourth degree.

(d) In addition to any term of imprisonment, fine, or other sentence, penalty, or sanction it imposes upon the offender pursuant to division (E)(5)(a), (b), or (c) of this section or pursuant to any other provision of law, the court also my impose upon the offender one or both of the following sanctions:

(i) It may require the offender, as part of the offender's sentence and in the manner described in division (F) of this section, to perform not more than two hundred hours of supervised community service work under the authority of any agency, political subdivision , or charitable organization of the type described in division (F)(1) of section 2951.02 of the Revised Code, provided that the court shall not require the offender to perform supervised community service work under this division unless the offender agrees to perform the supervised community service work.

(ii) It may suspend the driver's or commercial driver's license or permit or nonresident operating privilege of the offender for up to ninety days, in addition to any suspension or revocation of the offender's driver's or commercial driver's license or permit or nonresident operating privilege under Chapter 4506., 4507., 4509., or 4511, of the Revised Code or under any other provision of law.